UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Eighteenth Region

BEVERLY ENTERPRISES-MINNESOTA, INC., d/b/a GOLDEN CREST HEALTHCARE CENTER Employer and UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC Petitioner	Cases 18-RC-16415 and 18-RC-16416

SUPPLEMENTAL DECISION

The issue in this case is whether the Supreme Court's decision in NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706 (2001) requires reversal of my original conclusion that the Employer's RNs and LPNs, when acting as charge nurse, do not exercise independent judgment in assigning and directing the work of other employees. Upon careful review of the record, I find that Kentucky River does not require reversal.

Procedural History

I issued a Decision and Direction of Election in these cases on March 9, 1999, after which the Petitioner was certified as the representative of the Employer's LPNs and RNs. The principal issue was whether the Employer's RNs and LPNs acting as charge

nurse were supervisors within the meaning of the Act. I concluded they were not. The Employer tested certification in Case 18-CA-15295 (329 NLRB No. 22). The U.S. Court of Appeals for the Eighth Circuit granted review and remanded the case to the Board for reconsideration in light of the Supreme Court's decision in NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706 (2001).

On April 24, 2002, the Board vacated its decision in Case 18-CA-15295 and remanded Cases 18-RC-16415 and 18-RC-16416 to me "for further consideration and to reopen the record for the taking of additional evidence, if appropriate, on the issues of whether the Employer-Respondent's registered nurses and licensed practical nurses 'assign' and 'responsibly direct' other employees and on the scope or degree of 'independent judgment' used in the exercise of such authority." I, in turn, invited both parties to submit position statements on whether the record should be reopened and what if any additional evidence they thought should be adduced. Both parties assert that they submitted all relevant evidence in the original hearing and that, while Kentucky River changes the legal standard, it does not affect the relevant factual evidence. Moreover, the Employer asserts that it recognizes it has the burden of proof on the issue of supervisory status, that it has already submitted all its evidence on the issue, and that reopening the record would result in unnecessary delay.

Accordingly, I have reconsidered my original decision on the issue presented by the Board's remand, RNs' and LPNs' authority to responsibly direct the work of other employees. Once again, I conclude that RNs and LPNs acting as charge nurse do not

exercise sufficient independent judgment in that area, and I reaffirm my original decision that RNs and LPNs are not supervisors within the meaning of the Act.

In my original decision, I noted summarily that the Employer did not contend, and the record did not establish, that charge nurses have authority to hire, transfer (other than on a temporary basis to meet patient care needs, discussed as an aspect of direction of work below), suspend, lay off, recall, promote, discharge, reward, or adjust grievances of employees. I discussed in detail four issues that were substantially controverted: authority to discipline or effectively recommend discipline; authority to assign and direct the work of other employees; the effect of charge nurses' completion of performance evaluations on other employees; and the effect of charge nurses serving as the highest ranking Employer authority on site nights and some weekends.

The sole issue raised by the Board's remand, and the only issue addressed by the parties in their position statements, is whether RNs and LPNs acting as charge nurse exercise independent judgment to assign and responsibly direct other employees. Therefore, this decision will not revisit the other indicia of supervisory status resolved in the earlier decision.

Analysis

The burden of establishing supervisory status is on the party asserting it, here the Employer. Kentucky River, 532 U.S. at 711-712. Pursuant to Section 2(11) of the Act, supervisory status is established by a conjunctive three-part test: (1) the person in question must have authority to engage in any one of 12 supervisory functions listed in

Section 2(11); (2) their exercise of such authority must not be merely routine or clerical in nature, but must involve the use of independent judgment; and (3) their authority must be exercised in the interest of the employer. Kentucky River, 532 U.S. at 712-713; NLRB v. Health Care & Retirement Corp., 511 U.S. 571, 573-574 (1994).

The Supreme Court has rejected the Board's categorization of certain kinds of judgments as nonsupervisory if they were guided by "ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards." The Supreme Court did not, however, question the Board's authority to find that "the degree of judgment that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer." Kentucky River, 532 U.S. at 713-714 (citing Chevron Shipping Co., 317 NLRB 379, 381 (1995)). In this case, I conclude that the judgments of the charge nurses are so circumscribed by existing policies, orders and regulations of the Employer that they do not exercise independent judgment within the meaning of Section 2(11).

The Employer points out that charge nurses give directions to CNAs to change their patient, room, and even floor assignments; to perform particular patient care tasks; to leave early or stay late in contravention of posted schedules; to work overtime; and to work a shift for which they are not scheduled. In addition, charge nurses are authorized to sign off on time clock revisions. The evidence does not establish, however, that those decisions require independent judgments by the charge nurses.

The number of employees appears set by the schedule issued by the ADON. Who works which shift and where they work as to floor and a specific suite of rooms, are initially set by that schedule, pursuant to a bidding procedure established by the CNAs' collective bargaining agreement. If someone fails to show up for a scheduled assignment, the charge nurse follows a collectively-bargained procedure for finding a replacement.

Similarly, I find no evidence that charge nurses exercise independent judgment in releasing employees early from a scheduled shift or getting them to stay over. The number of employees appears to be dictated by the schedule and the census, and the identity of affected employees is determined by volunteers or the collectively-bargained procedure.

DON Kepler testified that charge nurses have authority to release CNAs early upon request, describing an example in which an employee was released early to care for a sick family member. The nurses testified, however, that ADON Marchetti has told them they are not to "approve" any requests to leave early, but are to simply allow the employee to go at their own discretion if they feel they have to, and leave it up to Marchetti later to decide whether to excuse or punish the absence. Marchetti did not testify. I find that is insufficient evidence to prove that there is any judgment involved in allowing employees to go home early.

Although Employer witnesses testified conclusionarily that charge nurses make changes in room and floor assignments based on independent judgment of CNAs' skills and abilities, the charge nurses testified as to particular incidents in which they merely

asked the CNAs to decide among themselves what each one would do when no-shows or changes in patient census caused imbalances in the work load. The Employer's conclusionary testimony is insufficient to satisfy its burden of proof. See, e.g., Parkview Manor, 321 NLRB 477, 478 (1996).

Regarding changes in time clock entries, there is no evidence this is anything but rubberstamping corrections requested by the CNAs. CNAs sometimes make their own corrections without needing a charge nurse's approval.

In addition, a charge RN is the highest authority on site nights and some weekends. There is no evidence that the night and weekend charge RNs have any different duties or responsibilities than they have at other times. Although there is no explicit standing order that the DON or ADON be available by phone during those periods to handle any problems, the evidence shows that the charge nurses do in fact routinely call the DON or ADON, or even the facility administrator, regarding issues such as staff shortages that the collectively-bargained "mandate" procedure did not satisfy. Thus, I find the record insufficient to establish that charge nurses exercise any greater independence nights or on weekends than they do weekdays. See Beverly Enterprises v. NLRB, 148 F.3d 1042, 1048 (8th Cir. 1998).

Accordingly, I find that the Employer's RNs and LPNs are not supervisors within the meaning of the Act. Petitioner's certification in these two cases therefore remains in effect.[1]

Dated at Minneapolis, Minnesota, this 20th day of August, 2002.

/s/ Ronald M. Sharp

Ronald M. Sharp, Regional Director
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[1] Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Supplemental Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 – 14th Street, NW, Washington, DC 20570. This request must be received by the Board in Washington by **September 3, 2002.**

Participants
Docket and Order

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